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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

## No. 1058

**LILLIAN BLEWEISS SMITH,**

Petitioner,

vs.

**COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,**

Respondent.

## Reply Brief

**Supporting Certiorari Petition.**

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# Reply Brief

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## SUMMARY.

The "unprinted record" cited by respondent is on a separate branch of the case which was rendered moot by the Circuit Court of Appeals' decision, and which is not involved in the Circuit Court of Appeals' decision nor in our Petition for Certiorari. The entire record on which the Circuit Court of Appeals' decision was based, and on which our petition is based, is now before this Court in printed form. The parties stipulated that the

"unprinted record" need not be printed at this time. (See Argument for citations and stipulation).

Respondent is a New York insurance corporation for the purpose of this petition, having so described itself in its motion to dismiss in the District Court, and being so described in the Circuit Court of Appeals' opinion. (Citations in Argument, *infra*).

Respondent was doing business in Indiana for jurisdictional purposes, as found by the District Court after hearing oral evidence, and not modified by the Circuit Court of Appeals on that branch of the case, so for purposes of the present petition this subject is settled and not here for review.

## I.

On the conflict between the opinion below and the Indiana Supreme Court on the "maturity" doctrine, Respondent makes no answer except to attempt a hair-splitting distinction which defeats itself. (See Argument, *infra*).

## II-III.

On construction of the Indiana statute, *Section* 39-1713, *Burns* 1933, Respondent offers no Indiana cases except a misleading citation of *General American Life Insurance Company* v. *Carter* (1944) 222 Ind. 557, 54 N. E. (2d) 944, without telling the Court that the case is based on a later and different statute, not here involved (Respondent's Brief, 3, 8). (See Argument, *infra*).

*Home Insurance Co.* v. *Dick* (1930) 281 U. S. 397 was a garnishment action *in rem*, where the insurance company *never did business* in Texas, and the Texas court had *no jurisdiction of its person* and hence no power to enforce its statutory public policy against it. The opin-

ion is expressly placed on that ground (p. 410). *Modern Woodmen* v. *Mixer* (1925) 267 U. S. 544 and *Supreme Council of Royal Arcanum* v. *Green* (1915) 237 U. S. 531 involved substantive—not remedial—parts of the contracts. (See Argument, *infra*).

The Indiana cases construing this statute, including *Kernel* v. *Nat. Life & Acc. Ins. Co.* (1938), 105 Ind. App. 181, 182, *transfer denied,* and *Rutherford* v. *Prudential Ins. Co.* (1905), 34 Ind. App. 531, 535-536, do not rest upon the question of whether the policy sued on was "issued in Indiana", as Respondent argues. The cases do not even mention that fact, treating it as immaterial, but the *Rutherford* case at least was one where the essential acts in dispute were transacted in Kentucky (pp. 535-536).

Respondent has no answer to this Court's decision construing this same Indiana statute in *Metropolitan Casualty Co.* v. *Brownell* (1935) 294 U. S. 580, 585-586, except to remark that the policy was "issued in Indiana and to be performed there",—a fact which appears only incidentally, if at all, in the *Brownell* opinion and was *not the basis of the decision.* Respondent has no answer to the point decided in the *Brownell* case,—that this statute is a remedial one and based on Indiana's public policy and applies to foreign insurance *companies* as a *class.* The opinion below distorts this statute into a classification of *contracts* and contract *holders* and denies Petitioner the protection of the statute on the arbitrary and discriminatory ground that her contract "matured" before she became an Indiana citizen. (See Argument, *infra*).

## ARGUMENT.

### The "Unprinted Record".

Respondent's attempted citations of an "unprinted record" need a word of explanation.

All the regular record which forms the basis of the decision of the Circuit Court of Appeals, and of our Petition for Certiorari, has already been printed and filed in this Court.

The "unprinted record" is a *supplemental* manuscript record containing evidence on an entirely *separate branch* of the case which was filed but never printed in the Circuit Court of Appeals. This branch of the case was never decided or passed upon by the Circuit Court of Appeals, because that court decided against us solely on the regular printed record which is now before this Court, and under its decision the branch of the case covered by the unprinted supplemental record became moot.

Upon our showing this situation to the Circuit Court of Appeals (R. 90, par. 5), that court made an order that this manuscript supplemental record be certified up to this Court in original form without printing and separate from the regular printed record, which has been done (R. 93).

After reaching this Court, Petitioner and Respondent filed a stipulation with the Clerk of this Court, as permitted by *Rule* 38(8), designed to avoid the unnecessary expense of printing this supplemental manuscript record until and unless its need might become apparent,

when it could then be printed either on order of this Court or on request of Respondent. The stipulation reads:

> "Come now petitioner and respondent by their undersigned attorneys of record and stipulate that the supplemental record certified up by the clerk of the Circuit Court of Appeals in this case in original form, need not be printed by the clerk of this court until and unless so requested by either party or directed by the court.
>
> This stipulation is without prejudice to the rights of either party on any subject in this case, and is without prejudice to the right of either party to apply for the printing of said supplemental record at a later date, and without prejudice to any questions respondent may have a right to predicate on the printed or supplemental record either in its present form or future form if printed."

More specifically as to the lack of necessity, or even propriety, of considering this supplemental record in determining the pending Petition for Certiorari:

In the District Court, defendant-respondent moved to dismiss the complaint on two separate grounds: (1) that defendant-respondent was not in fact doing business in Indiana and hence not subject to service of summons through the Auditor of State (R. 24 top); and (2) that the complaint was barred by a limitation clause in the policy sued upon (R. 25). The District Court heard evidence on the first issue (doing business) (R. 26 bottom) and decided that issue in favor of plaintiff-petitioner (R. 28), but decided the second issue (limitations) in favor of defendant-respondent (R. 28 bottom).

Plaintiff-petitioner appealed from the adverse decision on the limitations issue, but defendant-respondent took no cross appeal, nor assigned any cross error from the

decision against it on the doing-business issue within the ninety days allowed. However, after the ninety days and after plaintiff-petitioner had filed her printed record and brief in the Circuit Court of Appeals (being all the record bearing on the limitations issue which she was appealing), defendant-respondent petitioned the Circuit Court of Appeals for leave to bring up a supplemental record containing testimony of witnesses on the doing-business issue, so as to be able to argue that if the Circuit Court of Appeals reversed the District Court on the limitations issue, it should also reverse the District Court on the doing-business issue and thereby let defendant-respondent out of court on that issue. Plaintiff-petitioner resisted this request to bring up the supplemental record by a reply contending that it was an attempted cross-appeal too late. The Circuit Court of Appeals never made a final decision of the merits of that question but made a tentative order permitting the supplemental record to be filed in that court in manuscript form without printing, and with leave to plaintiff-petitioner to move to strike this supplemental record (R. 90, pars. 2 and 3). Such motion to strike was made but never ruled upon, because the Circuit Court of Appeals affirmed the case solely on the limitations issue and hence had no need to pay, and did not pay, any attention to the procedural question of whether defendant-respondent had properly brought up the doing-business issue and supplemental record thereon, nor the substantive question of the merits of that issue (R. 90, pars. 4 and 5; R. 74-78 opinion).

We rely on the principle that this Court will not review issues and evidence not decided by the Circuit Court of Appeals—that when a final decision of that court contravenes the law and petitioner's rights so

seriously as to merit review, this Court will review the questions on which the decision is based, but will not review a separate issue not decided by the Circuit Court of Appeals on the theory that that court might have reached the "same result" by deciding the other issue, as respondent attempts to argue. The District Court decided that other (doing-business) issue in favor of plaintiff-petitioner (R. 28) and this Court will accept that decision as final until and unless it is properly taken up to the Circuit Court of Appeals for review (and we have contended it was not) and there decided. This is particularly true because the District Court's decision of this doing-business issued rested on oral testimony (R. 26 bottom) which respondent improperly attempts to cite to this Court.

**Corporate Nature of Respondent.**

Contrary to respondent's confusing statement (page 1) that it is not a corporation but some kind of "mutual association":

1. Defendant-respondent's Amended Motion to Dismiss in the District Court admitted that it was and is "a corporation duly organized under and by virtue of the laws of the State of New York" (R. 23 bottom).

2. The Circuit Court of Appeals' opinion describes respondent as "a New York corporation" (R. 74).

3. The Indiana Supreme Court has held that the Indiana statute in question, *Sec.* 39-1713, Burns 1933, applies to all kinds of foreign insurance companies, including mutual and fraternal associations. *Caywood* v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482. This Court has also construed the same statute in accord with Indiana's decisions, as applying to foreign insur-

ance companies generally as a *class. Metropolitan Casualty Ins. Co.* v. *Brownell* (1935), 294 U. S. 580, 585, 586; 55 S. Ct. 534, 541.

**Doing Business in Indiana.**

The District Court, after hearing oral evidence on the doing-business issue (R. 26 bottom), expressly found and decided that "defendant was doing business in Indiana requisite for jurisdictional purposes," and based its decision on the law as applied "to the facts in this case" (R. 28).

The Circuit Court of Appeals did not review the District Court's finding and decision on the doing-business issue, and that issue is not here involved, as above shown under the discussion of the "unprinted record."

Respondent's attempt to justify the Circuit Court of Appeals' decision on the ground that the "correct result" was reached because respondent was not doing business, (pages 5, 15), seems to us to be an implied admission that the grounds of the Circuit Court of Appeals' decisions are untenable, otherwise respondent would not go to such pains to urge upon this Court oral evidence and law questions on the doing-business issue which are so clearly improper (pages 1, 5 (par. IV), 15).

**I.**

**Conflict with Indiana Supreme Court on "Maturity" Doctrine.**

Respondent, having no effective answer to this first ground of our petition, reverses the order of presentation and discusses this ground under III at pages 4 and 14.

Respondent's only answer is an attempt to make a hair-splitting distinction between the maturity of plain-

tiff-petitioner's "claim" and her "cause of action" (Respendent's Brief, 14).

But the Circuit Court of Appeals' opinion nowhere speaks of the maturity of a "claim" (R. 76). It makes no such distinction, nor any distinction, of the contrary Indiana case, *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946), Ind., 69 N. E. (2d) 244, 245, par. 3. Nor does the latter case mention any such distinction (page 245).

Confronted by a situation where the widow became an Indiana resident and citizen immediately after her husband's burial and *before* she furnished notice of death and *proof of loss* to the company (R. 35, par. 9 to R. 37), the Circuit Court of Appeals' opinion admits those facts (R. 75) and then lays down the law, without citing any Indiana authority, that "The *policy* had *matured* before it was in any way affected by the laws of Indiana • • • A *contract* of insurance *matures at death* • • • (R. 76, our emphasis). The opinion uses that doctrine as its *basic premise for denying* plaintiff-petitioner the protection of the Indiana statute (R. 76).

Respondent's futile attempt to explain its hair-splitting distinction is our best argument that no substantial distinction exists between the rulings of the Circuit Court of Appeals and the Indiana Supreme Court. Respondent says:

> "In the *Kelleman* case, the point was that filing of proof of death was a condition precedent to *maintaining the action* regardless of where the claim arose. The learned *Court of Appeals* said that the *right of action* arose at the death of the member. The *right or cause of action* and the *right to prosecute it* are two different things" (Respondent's Brief, 14, our emphasis).

The only authority cited for the above confusing doctrine, *May* v. *The State* (1893), 133 Ind. 567, 33 N. E. 352, rested on the peculiar situation that plaintiff had a claim against the *sovereign* state of Indiana for services in erecting a public building in 1860, for which there was no appropriation and no right to sue the sovereign state until it passed an act in 1889 consenting to be sued by persons "claiming to have a money demand against the State of Indiana, * * * accruing within fifteen years from the time of the commencement of the action." (133 Ind. 567-568). The sole question was the construction of the above statutory language, and the court held that the legislature intended to exclude plaintiff's claim which was more than fifteen years old. The court explained that: "the question presented for our consideration by the record in this case, is *not one for the ordinary application of the rules* governing statutes of limitation, but the question is whether the claim which constitutes the basis of the action *falls within the terms of the act* under immediate consideration." (p. 570. Our emphasis).

On the other hand, the law of Indiana is settled by a later *insurance* case, that in the field of insurance:

> "Such notice (of loss by insured to company) was a condition precedent to appellant's (company's) *liability,* * * *" (Our emphasis).
>
> *Newark Fire Ins. Co.* v. *Martinsville Harness Co.* (1920), 74 Ind. App. 14, 16; 128 N. E. 616.

The same doctrine is the basis of the above decision of the Indiana Supreme Court in *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946), Ind. , 69 N. E. (2nd) 244, 255, par. 3, which preceded the Circuit Court of Appeals' decision by eleven days. The court said that by the terms of the policy the company *did not promise to pay until* proof of death was furnished to it by the beneficiary (69 N. E. (2d) 244, 245, par. 3).

Our policy contains terms of payment practically identical with the policy in the above case of *Equitable* v. *Kelleman*:

> "Payment of benefits provided by Section A (death benefit, etc.) will be made within sixty days *after* receipt of due proof * * *. Affirmative proof of loss *must* be furnished * * *" R. 85, 42, 45.

Since the Circuit Court of Appeals' opinion used the "maturity" doctrine as the basic premise for denying plaintiff-petitioner the benefit of the Indiana statute (R. 76), this important right of an Indiana citizen under the contrary principle in *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946) Ind. , 169 N. E. (2d) 244, 245, should not be arbitrarily denied by an opinion which totally *ignores* the decision (R. 76), though the decision was urgently pressed upon the court as soon as discovered (R. 84-85, 86-87), and rejected without comment or attempted distinction by the court (R. 88 bottom).

The same principle was already established in Indiana prior to the above *Kelleman* case, by the above quoted *Newark Fire Ins. Co.* v. *Martinsville Harness Co.* (1920) 74 Ind. App. 14, 16; 128 N. E. 616, but even if the principle of the *Kelleman* case had been newly decided, it was still incumbent on the Circuit Court of Appeals to respect it and conform its opinion and decision to it, because Respondent does not dispute, and cannot dispute, that the Circuit Court of Appeals still had control over this case and power so to do when it made its refusal. (R. 88 bottom).

*Vanderbark* v. *Owens Illinois Glass Co.* (1941) 311 U. S. 538, 543, 61 S. Ct. 347, 350.

## II-III.

### The Indiana Statute—Public Policy and Comity.

Respondent has been unfair to this Court, and to Petitioner, by citing and arguing (Brief 3, 8) the case of *General American Iife Insurance Company* v. *Carter* (1944) 222 Ind. 557, 54 N. E. (2d) 944, without mentioning the fact that this case was based entirely on a *different statute* not here involved—the 1935 Act—and hence has no bearing on our case (222 Ind. at pp. 559, 564). The 1935 Act contained a saving clause, saving all of this Petitioner's rights under the earlier 1865 Act, as pointed out at pages 20-21 of our previous brief and not denied by Respondent's brief. The 1935 Act made important changes *in favor* of foreign insurance companies, which need not be gone into here because Respondent admits that this case comes under the 1865 Act, *Section* 39-1713, *Burns* 1933, which respondent describes as "the three year statute" (Respondent's Brief, 2 bottom, 4 top).

But in discussing this three year statute, Respondent goes right ahead and cites and argues the above *Carter* case, 222 Ind. 557 (Brief, 3, 8), *as if* it were authority on that statute, *without mentioning* the fact that it is based on a later and different statute. In fact, in arguing the *Carter* case, Respondent goes so far as to say: "The court refused to allow plaintiff to take advantage of this Indiana statute providing for service on a foreign insurance company found within the state." (Respondent's Brief, 8, middle). This is apt to be highly misleading because of the superficial resemblance of the *Carter* case to ours, and this misleading citation and argument is one of the reasons we deemed it necessary to file this Reply Brief.

Respondent cannot say it was ignorant of the above fact that the *Carter* case rested on a different statute, because Respondent's counsel was counsel for the insurance company in the *Carter* case, as shown by the report (222) Ind. at p. 559), and he was also counsel for the insurance company in the above case of *Equitable* v. *Kelleman* (69 N. E. (2d) at p. 244).

*Home Ins. Co.* v. *Dick* (1930) 281 U. S. 397 on which Respondent strongly relies, and on which the Circuit Court of Appeals based its decision (R. 76), is distinguished in our previous brief at pages 24-25 on the ground that the action was a garnishment action *in rem* with *no personal jurisdiction* over the defendant insurance company, which had *never done business* in Texas, and hence the Texas Court was powerless to enforce its statutory public policy against the insurance company, and the decision was *expressly limited* to that ground (281 U. S. at 410), whereas in our case defendant was personally before the court with a motion to dismiss which invoked and obtained the court's decision on the merits of the contract—the limitation clause (R. 25-26, 28-31, 74-78).

*Modern Woodmen* v. *Mixer* (1925) 267 U. S. 544, 45 S. Ct. 389, relied on by respondent, involved a *substantive* part of the insurance contract—a by-law which provided that long continued absence of the insured, short of his life expectancy, "shall not give any right to *recover on* any benefit certificate." The case holds that this *substantive* part of the membership contract in this fraternal beneficiary society, valid in Illinois where the society was incorporated, could not be abrogated by the Nebraska Supreme Court so as to permit plaintiff to sue in Nebraska and recover on the contract *before* the life expectancy of the insured had expired—in other

words before the contract was by its terms *due and payable* (p. 350).

*Supreme Council of the Royal Arcanum* v. *Green* (1915) 237 U. S. 531, 35 S. Ct. 724, 59 L. Ed. 1089, on which the above *Mixer* case is predicated, and which is cited along with the *Mixer* case in the Circuit Court of Appeals' opinion (R. 75), simply holds that New York cannot abrogate or regulate "an increase in the assesment rates" which a Massachusetts mutual benefit society levied on its members in New York, the rates being valid under Massachusetts law and sustained by a Massachusetts judgment.

Neither the above *Mixer* or *Green* cases are authority on (1) the power of Indiana to legislate on the *remedial* subject of limitations so as to enforce her own public policy in favor of Indiana plaintiffs suing in Indiana courts against foreign insurance companies which have impliedly consented to submit thereto by doing business in the state, (2) nor are those cases any authority on the *meaning* of the Indiana statute as construed by the Indiana courts and by this Court.

The language of *Modern Woodmen* v. *Mixer* (1925) 267 U. S. 544, 551, quoted by respondent to the effect that membership in a fraternal beneficiary society is like marriage, means the *substantive* parts of that relation and contract. It does not render Indiana powerless to regulate *remedies* when both the member and the corporation get into an Indiana court, any more than Indiana is powerless to regulate the remedy of divorce in its own courts when parties sue for divorce in Indiana, simply because they were married in New York.

Respondent admits at page 11 that: "Doubtless she (Petitioner) came to Indiana in good faith," but it ar-

gues "forsooth" that giving her the protection of the Indiana remedial statute will encourage states to pass long limitation statutes and encourage plaintiffs to go there to sue. The answer is that all a company has to do is to stay out of a state whose remedies it does not like, and refrain from doing business therein, and then its courts cannot acquire jurisdiction over the company.

Contrary to Respondent's attempted distinctions, the cases we cited, *Kernel* v. *Nat. Life & Acc. Ins. Co.* (1938), 105 Ind. App. 181, 182, 184-185, 12 N. E. (2d), *transfer denied*; and *Rutherford* v. *Prudential Ins. Co.* (1905) 34 Ind. App. 531, 535, 536, 73 N. E. 202, were not "issued in Indiana," as Respondent argues, so far as the cases show. The Indiana court in both cases considered this fact too immaterial to mention in its construction of the three year statute, *Sec.* 39-1713, *Burns* 1933. However, the *Rutherford* case seems to indicate that the New Jersey company issued the policy from its New Jersey office to insured while she was a resident of Kentucky—at least the transactions in question occurred in Kentucky (34 Ind. App. at pp. 535-536)—after which insured's administrator sued the company in Indiana where it was doing business and hence subject to process of an Indiana court.

Likewise respondent makes no answer to this Court's decision under this Indiana statute in *Metropolitan Casualty Ins. Co.* v. *Brownell* (1935) 294 U. S. 580, 55 S. Ct. 538, except to remark that the contract was "issued in Indiana and to be performed there" (Brief 16). These facts appear only incidentally, if at all, in the *Brownell* opinion and was *not the basis of the decision.* Respondent ignores, because it cannot answer, the basis of this Court's decision in that case, namely, that the three-

year statute applies Indiana's *public policy* to *all* foreign insurance companies as a *class* (294 U. S. at pp. 585-586).

Likewise ignored by Respondent is the fact that the Circuit Court of Appeals' opinion goes contrary to this Court's opinion in the *Brownell* case by converting the same statute into a classification of *contracts* and contract *holders* instead of *companies*, making the statute turn on such details as whether plaintiff-petitioner's contract "matured" before she became an Indiana citizen and denying her the *statute's* protection and remedial right *on that fine distinction*, while at the same time the Circuit Court of Appeals' opinion totally *ignores* this Court's *Brownell* opinion, though the case was cited by us and came up from that court (R. 76).

Therefore it is respectfully submitted that the Petition for Certiorari should be granted.

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COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,
*Respondent.*

## OBJECTIONS TO GRANTING WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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---

## OBJECTIONS TO GRANTING WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

---

### INACCURACIES IN PETITIONER'S STATEMENT.

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1. In petitioner's statement of the matter involved (p. 2), she says that respondent-defendant is a New York insurance corporation doing business in Indiana (R. 74, 28). On the contrary, respondent is a mutual association not organized under the general insurance laws of New York, but under Article VI which covers cooperative and assessment plans. (Testimony of Hubbard, Unprinted Rec. p. 64, ls. 13-17.)

2. That defendant transacted business in Indiana is stoutly denied and evidence in support of its position in that respect shows that all business was transacted by mail,

no agents employed or solicitation of business anywhere; that all applications were passed on at the Home Office in New York and certificates mailed from there and all claims paid there. (Testimony of Hubbard, Unprinted Rec. p. 64, l. 21; pp. 60 to 66, l. 6.)

3. Petitioner says (Brief, p. 11): "the District Court dismissed the original complaint on the ground that the plaintiff had become a resident (of Indiana) after the action accrued. The policy had matured before it was in any way effected by the laws of Indiana." This statement calls for a disentangling operation. The court did not dismiss the case on the ground that the plaintiff had become a resident after the action accrued, but on the contrary, refused to let the fact of her residence interfere with or prevent the dismissal, which he felt constrained to make because of the one year limitation. Moreover, the court did not use italics in the opinion, as petitioner has copiously and frequently done, and in some instances not accepting responsibility for the italics, notably on pages 14 and 15 of the brief; quoting from *Metropolitan Casualty Co.* v. *Brownell*, 68 Fed. (2d) 481, on page 17; quoting Section 39-1710, Burns Indiana Statutes, on page 21; quoting 37 C. J. 731, on page 23.

## Questions Presented.

(Petitioner's points are here discussed in what is deemed to be the order of their importance rather than the order in which they have been presented.)

### I.

Petitioner's second point is that the decision deprives her as an Indiana citizen of the protection of the three year statute and to that extent discriminates against her as such citizen. This contention is unsound because:

(a) The Indiana Act was not intended, nor can it be

ed to reach contracts (1) not made by an Indiana
ıy, (2) not issued in Indiana, and (3) not to be per-
co in Indiana.
co *Home Ins. Co.* v. *Dick,* (1930) 281 U. S. 397; 74
fo L. Ed. 926.
*General Am. Ins. Co.* v. *Carter,* (1944) 222 Ind. 557.

To uphold this contention would mean striking
ı valid contract made in New York and enforceable

d *Hanna* v. *Comm. Trav. Mut. Accid. Assn.,* (1923)
tl 236 N. Y. 571; 142 N. E. 288.
*Savery* v. *Comm. Trav. Mut. Acc. Assn.,* (1933)
263 N. Y. S. 118.
*Nigro* v. *Comm. Trav. Mut. Acc. Assn.,* (1945)
47 N. Y. S. (2d) 169.

Petitioner had no rights in respect to this contract
the Insurance laws of Indiana. It was executed in
ork and expressly provides that it is to be governed
laws of New York and to be performed, that is,
nt made in New York. The domicile of a member
beneficiary is immaterial.
*Modern Woodmen of America* v. *Mixer,* (1925) 267
U. S. 544; 69 L. Ed. 783.

The alleged right of the Indiana citizen was not
respect to an Indiana contract, for there was no
ıa element expressed, implied or contemplated in
rtificate of membership held by the decedent.
*Home Ins. Co.* v. *Dick,* (1930) 281 U. S. 397; 74
L. Ed. 926.

Petitioner was not a citizen of Indiana at the time
ıe contract was executed in New York, (2) the alleged
nt occurred in Georgia, (3) when the member died
orgia, and (4) she was at all three times above enumer-
ı resident and citizen of Pennsylvania.

(f) Petitioner does not show that the Supreme Court of Indiana has construed the three year limitation provision to apply to contracts not made in Indiana. The District Court and the Circuit Court of Appeals were therefore at liberty to place their own construction upon it.

*MacGregor* v. *State Mutual Life Assurance Co.*, (1942) 315 U. S. 280; 86 L. Ed. 846. See same case below 119 Fed. (2d) 148.

## II.

Petitioner contends that the decision strips Indiana of all power to enforce her own public policy of protecting her citizens suing in her own courts with respect to the subject of limitations. The decision does not state the rule of comity in such broad or comprehensive terms. Indiana is still at liberty to make and enforce her own statutes with respect to (a) contracts made in Indiana; (b) contracts to be performed in Indiana; (c) where there is no contractual limitation set up by the parties, valid in the jurisdiction where the contract was made.

*Home Ins. Co.* v. *Dick*, (1930) 281 U. S. 397; 74 L. Ed. 926.

## III.

Petitioner's first point is that the decision of the Court of Appeals is in conflict with *Equitable Life Assurance Society* v. *Kellemen, Ind. Sup. Ct.*, November 8, 1946, 69 N. E. (2d) 244. There is no such conflict for the reasons:

(a) The Kellemen decision stated the conditions precedent to maturing the "cause of action," that is, what must be done before an action may be maintained. The decision of the Court of Appeals in the instant case says the right to make a claim under the policy matured at the death of the insured. There is a clear distinction between

the time when a right accrues and the time when an action may be commenced to enforce it.

*May* v. *The State,* 133 Ind. 567 (1893).

"Actions" 1 Am. Jur. p. 405, sec. 3.

(b) If respondent is right concerning the first two propositions herein, it is immaterial when the policy matured or the cause of action matured, as in any event the action was required to be commenced within one year from the date of the accident.

## IV.

Notwithstanding the foregoing contentions of the petitioner, the District Court reached the correct result in dismissing the action. The evidence shows that respondent conducted its business exclusively by mail and therefore it is not subject to service in other jurisdictions than that of its domicile.

*Minn. Comm. M. Assn.* v. *Benn,* (1923) 261 U. S. 140; 67 L. Ed. 573.

## SUMMARY OF ARGUMENT.

1. A contract limitation, valid where made, is enforceable elsewhere.

2. Decedent was a member of a mutual society, not the holder of an insurance policy.

3. To respect the contract limitation is not to violate the public policy of Indiana.

4. There is no conflict between the decision of the Circuit Court of Appeals affirming the District Court and applicable decisions of Indiana.

5. Respondent was not doing business in Indiana.

## ARGUMENT.

Petitioner cannot prevail unless she can establish that because she moved to Indiana before she commenced suit, she has rights there that she did not have where the contract was made and to be performed; that she is conscious of this burden is evidenced by her stressing the point so vigorously. Or, what she asks is that a court sitting in Indiana delete from a New York contract a provision that stands in her way. If she fails in this, all her other contentions go for naught.

But the one year limitation did not always stand in her way, because respondent denied liability on the merits 5 months before the year expired, to wit, on March 27, 1934 (Ex. P, Rec. 57) again on April 4, (Ex. T, Rec. 59) and yet again on May 8, (Ex. V, Rec. 61).

This Court has already disposed of petitioner's main contention in *Home Ins.* v. *Dick*, 281 U. S. 397. Here the Court considered a policy contract made and admittedly valid in Mexico, and a one year limitation therein for commencing action upon it. Dick, a citizen of Texas, commenced the suit in a Texas court to recover on the Mexican policy. The company was not admitted in Texas and had no agent there, and did not transact business therein. The Home Insurance Co. and others were garnisheed, and thus the Texas courts claimed jurisdiction *in rem*. Texas had a two year limitation forbidding a shorter one, as against the Mexican contract for one year.

It is important to note that this Court said that it was immaterial whether the contract limitation related to the remedy or the substance (petitioner herein claims that it

is part of the remedy) and, speaking by Justice Brandeis, the Court said:

> "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. * * * If, on the other hand, the (Texas) statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.
>
> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. * * *
>
> "A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance."

The Court also dealt with the question of public policy and decided that the case was not one for the application of the public policy of Texas as prescribed in its statute of

limitations, pointing out that the Mexican corporation never was in Texas, and that none of the defendants ever invoked the aid of the Texas courts or the Texas laws; that the garnishees were brought in by compulsory process. The Court said:

> "Neither has asked favors. They ask only to be let alone."

Moreover, the Court finally demolished the theory by saying:

> "But in Texas, as elsewhere, the contract was subject to its own limitations."

There is some analogy between this decision and that of the Supreme Court of Indiana in *General American Life Ins. Co.* v. *Carter*, (1944) 222 Ind. 557. The Indiana court refused to entertain for a non-resident of Indiana an action on an insurance contract made and to be executed in a foreign state, where service was had on the Commissioner of Insurance. The Court refused to allow the plaintiff to take advantage of this Indiana statute providing for service on a foreign insurance company found within the state.

**The Contract Was Made in New York to Be Performed There and Sanctioned by the Laws and Decisions of That State.**

*Hanna* v. *Comm. Trav. Mut. Accid. Assn.* (1923), 236 N. Y. 571; 142 N. E. 288, holds the contract limitation is valid.

As this Court pointed out in the Dick case, here was a contractual agreement concerning the time for beginning action, and being valid in New York, it must be recognized elsewhere.

Moreover, petitioner ignores the distinction between membership in a mutual assessment association, such as

this, and an arms-length, as it were, policy of insurance. One who purchases a policy of insurance does not ordinarily become a part of the corporation which grants it (there is some right to a limited extent, such as voting, in mutual companies).

The difference between purchasing a policy of insurance, a potential chose in action, and becoming a member of a mutual society or association, is not a novelty in this Court. In *Modern Woodman of A.* v. *Mixer,* (1925) 267 U. S. 544; 69 L. Ed. 783, a society organized in Illinois issued in South Dakota a certificate of membership to a resident of that state. The question was as to the validity of a by-law adopted at the corporate domicile. Suit was commenced on this certificate in Nebraska, and the question immediately presented was whether the by-law valid in Illinois was valid elsewhere.

Mr. Justice Holmes disposed of the case in favor of the society, epitomizing the whole doctrine in language which we shall not attempt to paraphrase. He said:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law is elaborated in *Supreme Council R. A.* v. *Green,* 237 U. S. 531. * * * The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that they cannot attach to membership rights against the company that are refused by the law of the domicile. It does not matter that the member joined in another state."

Respondent's position is stronger, because Smith made application for membership in New York City.

So petitioner must overcome the doctrine and language of this Court in two controlling cases which completely encompass it from every approach undertaken by the petitioner. These decisions establish the error of her claim.

**No Public Policy of Indiana Is Violated.**

The petitioner argues that the decision below "lays down the rule of comity so broadly that Indiana is powerless to enforce her public policy against a contractual limitation, in her own courts, simply 'because the contractual limitation is valid in New York, the *loci contractus'*, as stated in the opinion below (R. 76, bottom)". (Brief, p. 21.)

It is submitted that petitioner's quotation from the decision below is taken from its context which includes the further pertinent observation of the court, to-wit:

> "As we have already noted, the contract had its origin in New York and was issued to a citizen of Pennsylvania. The insured was injured and died in Georgia. Nowhere does it appear that the parties to this contract ever contemplated performance or that performance was to be had in Indiana. *In such a situation* we think it is clear that we must look to New York and not Indiana law." (Our italics.)

In other words, the Circuit Court of Appeals' refusal to apply in Indiana a statutory prohibition against the contractual limitation involved herein was not only because such contractual limitation was valid in New York, the *loci contractus*, but also because there was not a single Indiana element in the entire situation which would afford jurisdiction for the application of the Indiana law.

But, petitioner does not cite an Indiana case which attempts to apply the three year limitation to a contract made outside the state and not to be performed herein even

though sued upon in Indiana. She therefore exhibits the fatal weakness discussed in *MacGregor* v. *State Mutual Life Insurance Co.*, (1942) 315 U. S. 280, affirming 119 Fed. (2d) 148, which holds that in the absence of such a showing, the District Court and Circuit Court of Appeals were at liberty to place their own construction on this statute.

Petitioner is insisting that she may call upon the courts of Indiana to modify her contract made in New York to be performed there with a then citizen of Pennsylvania. All this, forsooth, is upon the idea that before she commenced suit she moved to Indiana, which is equivalent to contending that she had a right to survey the laws of the entire United States and shop around for the most favorable one. Doubtless she came into Indiana in good faith, but if her theory is to be upheld, it will open the door to as much migration of insurance claims as the notorious divorce situation has developed. To uphold this contention would be to sanction in advance and unwittingly invite action by some litigation-minded state to pass a statute of limitations providing that an action may be brought on an insurance policy or claim within twenty years after the alleged loss and that there shall be no defense that the action has been barred by a contract limitation valid in the state where the contract was made. No less absurd and unsound is the philosophy of petitioner's position.

But the petitioner urges that the question of limitations, being merely a matter of remedy, is governed by the law of the forum, and cites *Karvalsky* v. *Becker*, 217 Ind. 524 in support of this universal rule. Of course, it must be always kept in mind that the Karvalsky case presented a situation wherein the society was an Indiana corporation, and of course, the power of the Indiana Legislature to regulate the activities of such a corporation is practically unlimited.

However, Justice Brandeis disposed of this question in *Home Ins. Co.* v. *Dick*, where he said the Texas statute would command the enforcement of obligations in excess of those contracted for.

The learned District Judge appreciated this point and said in his opinion ~~dissenting~~ dismissing this action (R. 30):

> "When closely analyzed section 39-1713 is not a statute of limitations in the orthodox sense. It does not provide that actions on any insurance policy wherever issued shall not be barred in Indiana within a period of three years after the cause of action has accrued notwithstanding any provisions in the policy to the contrary. Although its effect is to enlarge the time to sue where the contract of insurance contains a condition not to sue for a period of less than three years, the statute goes to the validity of such a provision and not to the remedy—that is, access to the courts,—as to actions on *any* contract of insurance wherever made or issued. Surely, Indiana does not presume to invalidate contractual provisions of a contract which neither was made in Indiana nor was to be performed there and which never had any connection with the state or its inhabitants until after the action accrued."

Moreover, he expressly limited the application of the Indiana statute to policies "issued in Indiana", citing the *Dick case.*

Certainly it is axiomatic that before such a prohibitive statute can be applied, it is necessary that there be some activity within the State of Indiana in connection with the issuance of the contract or the place of performance. As respondent has already pointed out, p. 7, *supra,* the statute itself can only be construed to apply to policies issued within the State of Indiana.

Subject only to restrictions laid upon it at its domicile, an insurer doing business in other states may have as many valid contracts as the several states approve. There may

be no two alike, and under the doctrine of the *Dick case* the courts of each state must uphold the validity of any such contract valid where made.

It could not be said that if a claimant moved from one of those states to another where this rule applied, she could ignore the contract limitation that was valid where and when made in favor of a more favorable one in the forum she shopped around to find. The idea of avoiding a contract limitation fairly entered into by changing citizenship after the contract became a claim may be ingenious, but so far it is not observed that it has obtained the sanction of any court. The District Court stated the fallacy of petitioner's position in language quoted above and upon which respondent would not attempt to improve.

In *Henning* v. *Hill,* 80 Ind. App. 363 (1923), the court permitted an action on a contract made and valid in Illinois, a like contract not being permitted to be made in Indiana. No public policy of Indiana was violated, the Court said, and the doctrine of comity was applied.

Respondent has no quarrel with the rule that the law of the forum is ordinarily controlling as to the limitation period applicable. But the Indiana statute which petitioner seeks to have enforced against the respondent here is not a statute of limitations, but is a statute which prohibits certain contractual provisions in insurance contracts (*Home Ins. Co.* v. *Dick*). There is a statute of limitations in Indiana applicable to actions on insurance policies which provides that actions on written contracts must be brought within ten years. Petitioner is not seeking to have this statute applied under the general rule stated in the Karvalsky case, but is seeking to apply another Indiana statute which is not a statute of limitations and does not stipulate the period within which actions must be begun, but is a statute which prohibits certain provisions in insurance policies which are issued within the State of Indiana.

## III.

There is no conflict between the decision of the Supreme Court of Indiana in *Equitable Life Assurance Society* v. *Kellemen*, 69 N. E. (2d) 244, and the ruling of the District Court and the decision of the Circuit Court of Appeals, 158 Fed. (2d) 65. Regardless of language which may be lifted from its context in either opinion, it gets down to this:

In the Kellemen case, the point was that filing of proofs of death was a condition precedent to maintaining the action regardless of when the claim arose. The learned Court of Appeals said that the right of action arose at the death of the member. The right or cause of action and the right to prosecute it are two different things. The Supreme Court of Indiana said so in *May* v. *The State*, 133 Ind. 567 (1893). The question was whether an action against the state was timely brought. The court said:

> "We think it quite clear that there may be a claim or demand without any right to sue for its recovery. It has been held by this court that a claim may accrue at one time, and a right to sue for its recovery may accrue at another and different time. *Indianapolis, etc., R. W. Co.* v. *Center Township*, 130 Ind. 89."

There is nothing in the opinion of the Supreme Court of Indiana or that of the Circuit Court of Appeals to indicate that either court does not subscribe to the rule that the right to a claim arises or "matures" at the death of a member, and that the right to maintain an action thereon arises or "matures" when certain conditions precedent, such as filing proofs of death, have been complied with.

Under the facts in the two cases, which are wholly dissimilar, it is apparent that the courts were talking about two different things, one about the maturity of the claim, and the other about the maturity of the cause of action.

**The Cause Should Have Been Dismissed Because Respondent Was Not Doing Business in Indiana.**

It will be noted that in the memorandum opinion, the District Court found that the facts would have required a dismissal of the action for lack of jurisdiction under the authority of *Minn. Comm. M. Assn.* v. *Benn,* (1923) 261 U. S. 140, but for the decision of the Supreme Court of Indiana in *Karvalsky* v. *Becker,* 217 Ind. 524. This was upon the fact that in the *Karvalsky case,* the society mailed its certificate to West Virginia to a member residing there. The District Court erroneously construed this isolated fact to be the basis of the decision of the Supreme Court of Indiana, whereas actually the court found that the society had members in West Virginia who solicited other members in that state, collected their membership dues, deducted commissions and remitted the balance to the Home Office in Indiana. This, we submit, was doing business in West Virginia regardless of how the certificate of membership was forwarded or reached the member. There is no pretense that this record reveals that respondent ever had an agent or solicitor in Indiana or ever collected money there or transacted any business whatsoever. True, petitioner claims that by sending a representative to Gary after the claim had been made and executing there an autopsy agreement months after the death of the member constituted doing business in Indiana. This is so far fetched that it needs no particular comment. Isolated or casual acts are always treated as not within the definition of doing business. See *Sasnett* v. *Iowa State Comm. Mens Assn.,* (1937) 90 Fed. (2d) 514.

So, under the authority of *Letulle* v. *Scofield,* (1940) 308 U. S. 415; 84 L. Ed. 355, respondent submits that the District Court actually had two good reasons for dismissing

the case, though he recognized only one. The other is now offered here.

**Observations on Certain Cases Cited by Petitioner.**

Among the cases not heretofore discussed herein, petitioner cites several construing the Indiana statute forbidding less than three years limitation on Indiana contracts.

So far as appears in *Kernel* v. *National Life & Accident Ins. Co.*, 105 Ind. App. 181, and *Rutherford* v. *Prudential Insurance Co.*, 34 Ind. App. 531, the contracts of the foreign insurance companies were issued in Indiana.

*Metropolitan Casualty Insurance Co.* v. *Brownell*, 68 Fed. (2d) 481, the decision of the Seventh Circuit Court of Appeals, was set aside by the granting of a certiorari from this Court and the decision rendered herein in 284 U. S. 580; 55 Sup. Ct. 538. It involved a contract of a New York corporation issued in Indiana and to be performed there.

*A. B.* v. *C. D.*, (D. C. Pa. 1940) 36 F. Supp. 85; affirmed, 123 Fed. (2d) 1017; certiorari denied, 314 U. S. 691, is interesting because it is a holding that since there was no cause of action for breach of promise in New York where the woman lived, she could not acquire one under the laws of Pennsylvania. The Court decided the case on the ground that there was no right of action in New York or Pennsylvania, and then added some dictum concerning the public policy of Pennsylvania.

*Union Trust Co.* v. *Grosman*, (1918) 245 U. S. 412; 38 Sup. Ct. 147; 62 L. Ed. 368, holds that a married woman residing in Texas, being forbidden there to become a surety so as to involve her separate property, could not journey to Illinois and there make such contract. The

ed States Court sitting in Texas refused to enforce contract against her and was affirmed by this Court.

*laxon* v. *Stantor Electric Mfg. Co.*, (1941) 313 U. S. 61 Sup. Ct. 1020; 85 L. Ed. 1477, holds that the Court , in its discretion, allow or refuse to allow interest, ending upon the policy of the forum. It does not in- e a contract obligation to pay interest.

he quotation (Brief p. 23) from 37 C. J. 731, "Limita- s of Actions", is not applicable to a contract stipula- limiting the time to begin an action.

fter all, as Mr. Justice Holmes said in the *Mixer* case, nbership looks to and must be governed by the laws of state granting the incorporation. Therefore, petitioner rawn into New York and the law of that state upholds respondent in all respects.

Respectfully submitted,

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